In The

# Supreme Court of the United States

October Term, 1978

No. 78-1255

HARRY B. HELMSLEY, et al.,

*Appellants,*

*vs.*

THE BOROUGH OF FORT LEE, et al.,

*Appellees.*

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AMERICANA ASSOCIATES, et al.,

*Appellants,*

*vs.*

THE BOROUGH OF FORT LEE, et al.,

*Appellees.*

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NEW JERSEY REALTY COMPANY, et al.,

*Appellants,*

*vs.*

THE BOROUGH OF FORT LEE, et al.,

*Appellees.*

*On Appeal From the Supreme Court of New Jersey*

## MOTION TO DISMISS

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**MOTION TO DISMISS**

The appellees, Borough of Fort Lee, et al., hereby move to dismiss the appeal herein on the ground that it does not present a substantial federal question. In the event this appeal is regarded as a petition for writ of certiorari, as alternatively requested by appellants (JS4),* certiorari should be denied for essentially the same reasons that the appeal should be dismissed.

## QUESTION PRESENTED

Does appeal from a state supreme court's judgment, wherein firmly established constitutional principles respecting economic regulation were applied to the facts of a particular case which facts were rigorously reviewed, present a substantial federal question?

## STATEMENT

This appeal involves a continuation of the attack by Fort Lee landlords upon the validity of the Borough's rent leveling ordinance, Ordinance No. 74-32 as amended (JS86a-105a). Rent leveling has existed in Fort Lee since early 1972; the present ordinance (No. 74-32) was adopted in November of 1974.

The history of this litigation, described in the opinion of the Supreme Court of New Jersey (JS3a-7a), began in 1974 and has had a long and complicated history. The record is enormous. Indeed, the 1977 hearing on remand alone consumed seventeen trial days (JS5a). The state supreme court, as evident from its lengthy opinion, carefully reviewed the facts, most of which were in the form of documentary or financial data, prior to issuing its judgment from which this appeal is taken. In essence, the landlords' appeal requests that this Court undertake a complete re-examination of the record.

In considering the issues now raised in the pending appeal, the Supreme Court of New Jersey used a two-step analysis. First, the court examined whether there was any rational basis



for the enactment of a rent leveling ordinance by the Borough, and concluded that there was (JS8a-9a). The extremely low vacancy rates established a serious housing shortage, a rational basis for rent leveling, even when measured by the standards of the landlords' own experts.

Second, the court, having concluded that rent leveling was justified, then considered in detail whether the landlords were deprived of a "just and reasonable" return by application of the ordinance (JS9a-35a). In relating returns to values of the rental housing properties, the court found that rates of returns achieved in 1976 (the last year of actual financial data presented by the landlords) were in the aggregate approximately ten percent of value, which rate satisfied the landlords' own criteria for desired return (JS12a). When analyzed on a net operating income approach, the court found, *inter alia,* that the automatic increase provision of the ordinance had not caused a decrease in landlords' profits from 1973 to 1976 (JS18a). Indeed, it acknowledged that use of "1973 as the standard may be unduly generous to the landlords," since 1973 was a relatively good year for them (JS18a, fn. 11). The ordinance was, therefore, held to be nonconfiscatory up to December 31, 1976.

The focus of the court as to the post-1976 period was dramatically different. The test used was no longer the reasonableness of the ordinance based upon proven or actual financial data. The test became one of "foreseeability" for the long-range future, rather than for a particular year (JS22a). Foreseeability was likewise a "generous" standard for the landlords. Likewise the court's view of the inadequacy of the hardship mechanism of the ordinance was extremely liberal to the landlords. (A hardship surcharge was allowed in addition to automatic rent increases; the median percentage hardship surcharge granted was 13.65% of revenue (JS28a), indicating that relief in individual cases was available and granted.) In any event, the court invalidated the 2½% automatic increase provision of Ordinance No. 74-32 for the years subsequent to 1976, and directed that the Consumer Price Index standard, an alternative set forth in the ordinance, be followed.

The validity, as applied, of the "Maximum Annual Percentage" formula in Ordinance No. 76-8 (JS100a-105a) was not presented to the Supreme Court of New Jersey (JS38a-39a, 85a).

The opinion of the Supreme Court of New Jersey is reported as *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 394 A.2d 65 (1978).

## ARGUMENT

**This appeal presents no substantial federal question warranting review by this Court.**

1. The landlords, in arguing that rent control legislation must be founded upon a national or local emergency, are advocating a substantive due process philosophy which has been deliberately, consistently and long ago discarded by the Supreme Court. Indeed, that their arguments are based upon outmoded theories of due process is demonstrated by their heavy reliance upon economic regulation cases of the 1920's.

Since 1934, When *Nebbia v. New York*, 291 U.S. 502, was decided, the validity of price control legislation has not depended upon the existence of an emergency. The discarding of the "emergency" theory of due process was recognized in *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941), where the Court specifically rejected the contention "that special circumstances must be shown to support the validity of such drastic legislation as price-fixing."

The landlords must also fail in their attempt to extend cases, such as *Bowles v. Willingham*, 321 U.S. 503 (1944), to stand for the proposition that rent control legislation must be supported by an emergency. The existence of a war-time emergency may have been necessary to the holding in *Bowles* that there is "no constitutional necessity of providing a system of price control on the domestic front which will assure each



landlord a 'fair return' on his property." 321 U.S. at 519. It certainly does not mean that an emergency is constitutionally required to support any form of rent control under the exercise of the police power, particularly a form, such as at issue here, which has been analyzed under the criterion of "fair return".

Moreover, a rational supporting basis for the ordinance, *i.e.*, a serious housing shortage, was found to exist. Of course, the wisdom of the ordinance is not a matter of judicial concern, as stated in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955):

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted include *Nebbia* and *Olsen*.]"

2. In its opinion, the Supreme Court of New Jersey began with the assumption that "a rent control ordinance must permit an efficient landlord to realize a 'just and reasonable' return." (JS2a). That assumption, which pervades the entire opinion, is the mandated constitutional standard. The landlords do not contend otherwise. The state supreme court, as it recognized (JS2a-3a), did not alter the standard, but rather considered its application to the facts of this particular case.

The review of the facts by the Supreme Court of New Jersey was by no means perfunctory. The lengthy opinion is almost entirely restricted to discussion of the facts. The court's findings, which have ample support in the record, should not be disturbed. It is submitted that plenary consideration by this Court is not warranted to review a factual record already carefully scrutinized by a state supreme court, which applied an established constitutional principle to the relevant facts.

3. The opinion of the Supreme Court of New Jersey does not refer to the federal constitution, nor does it cite any United States Supreme Court, or other federal court, cases, except tangentially (JS10a). The constitutional principles previously established by the New Jersey Supreme Court in *Hutton Park Gardens v. West Orange Town Council,* 68 N.J. 543, 350 A.2d 1 (1975); *Brunetti v. Borough of New Milford,* 68 N.J. 576, 350 A.2d 19 (1975); and *Troy Hills Village v. Parsippany-Troy Hills Tp. Council,* 68 N.J. 604, 350 A.2d 34 (1975) were never seriously questioned or challenged by any party.

## CONCLUSION

For the foregoing reasons, the questions presented by appellants are clearly insubstantial and, accordingly, the appeal should be dismissed.

Respectfully submitted,

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